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No. 92-1956

IN THE

Supreme Court of the United States

October Term, 1993

CONSOLIDATED RAIL CORPORATION,
Petitioner,

vs.

JAMES E. GOTTSHALL and ALAN CARLISLE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* AND BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

CHARLES F. CLARKE
Counsel of Record
BRADLEY J. BICKETT
BRENDA M. JOHNSON
SQUIRE, SANDERS & DEMPSEY
4900 Society Center
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500
Attorneys for Amicus Curiae Association of American Railroads

Of Counsel:
ROBERT W. BLANCHETTE
Vice President-Law and General Counsel
DANIEL SAPHIRE
General Attorney
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505

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Pursuant to Rule 37.4 of the Supreme Court Rules, the Association of American Railroads (AAR) moves for leave to file the attached Brief of *Amicus Curiae* in support of petitioner. Respondents James E. Gottshall and Alan Carlisle have refused consent to the filing of this Brief.

AAR is a voluntary, nonprofit, incorporated trade association. Its members constitute the vast majority of the nation's railroads, operating approximately 76 per cent of the total line-haul mileage, producing approximately 91 per cent of the freight revenues, and employing approximately 90 per cent of the railway work force in the United States, which numbers in total about 260,000 employees. AAR represents its members before courts, agencies and the Congress on matters of general concern to the railroad industry.

Working conditions for railroad employees today are safer than they have ever been before.[1] However, AAR members spend almost one billion dollars annually under the Federal Employers Liability Act (FELA) to compensate employees who are hurt on the job. This amount has been increasing steadily in recent years despite a continued decline in injuries.[2] Thus, any

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[1] According to the U.S. Dept. of Transp., Federal Railroad Administration, *Accident/Incident Bulletin*, 66,924 injuries were reported by railroad employees in 1979. By 1992 the number of reported injuries dropped to 17,755. Although the number of railroad employees also had decreased (from 487,534 to 235,834), as well as the number of manhours worked (from 1077 million to 517 million), these figures show that the injury rate per million manhours declined from 62.23 to 34.34. *See also* The Bureau of Labor Statistics, *Occupational Injuries and Illnesses in the United States* 2,18,75 (1991) rating railroad work safer, 7.6 injuries per 100 full-time workers (200,000 man hours), than the average for all industries (7.9), or than trucking (14.5), water transportation (11.6), or air transportation (14.0).

[2] In 1979, railroads paid $296,000,000 in FELA claims. Association of American Railroads, *1979 Claims and Litigation Report* (1980). In spite of steadily decreasing railway injuries (see footnote 1 *supra*), the amount paid in 1992 had increased to $963,000,000. *See 1992 Claims and Litigation Report* (1993).

judicial decisions which expand the scope of compensable injury under FELA to include work-related emotional stress by a railroad employee are of material interest and concern to AAR.

The two decisions of the Third Circuit now before this Court, if allowed to stand, would even further increase the cost of FELA to the nation's railroads because they permit recovery under FELA for purely emotional injury without any contemporaneous physical impact injury to the employee which precipitates the emotional stress.

AAR has another strong interest in this case as a result of the fact that railroads, because of their widespread operations, are subject to suit in a number of different venues, often in places that have little connection to the accident that gives rise to the suit.[3] The liberal venue provisions of FELA have made forum shopping commonplace.[4] Since *Buell* there have been a large number of decisions by lower federal courts on the issue of whether and under what circumstances emotional injuries are cognizable under FELA. The courts have reached widely varying results, from requiring that there be a physical impact as a condition

[3] Railroads can be sued under FELA in state or federal court wherever the railroad is doing business. 45 U.S.C. §56.

[4] For instance, in its Petition for Writ of Certiorari filed with respect to *Burlington Northern R.R. Co. v. Ford*, 819 P.2d 169 (Montana 1991), *cert. granted*, 112 S.Ct. 964 (1992) (No. 91-779) (challenging Montana's liberal venue provisions), Burlington Northern Railroad Company documented that two counties in Montana with pro-plaintiff reputations had become magnets for FELA filings. During a six year period, over 85 percent of Montana FELA claims were filed in those two counties, even though none of those claims alleged an injury had occurred in the county of venue, and only 10 (out of 122) were brought by a resident of the county of venue. Burlington Petition at 16.

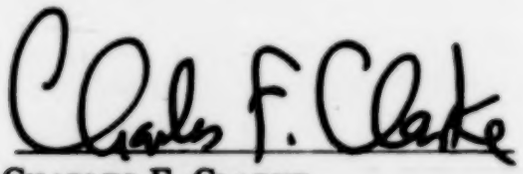
for recovery, *see, e.g., Gaston v. Flowers Trans.*, 866 F.2d 816 (5th Cir. 1989), to, as the cases at bar held, permitting recovery for any injury that is foreseeable. When such a serious conflict exists among the circuits, railroads are particularly vulnerable as FELA plaintiffs have a greater ability to select favorable jurisdictions than do plaintiffs in other types of actions. Therefore, AAR has a strong interest that there not be a migration of marginal cases to the Third Circuit.

A further interest of AAR in these cases is the effect they will have on the heretofore well-established employer-employee administration of the Railway Labor Act (RLA). Under that act, work-related grievances, whether or not related to the interpretation or application of a collective bargaining agreement, are subject to mandatory mediation under the procedures therein set forth. 45 U.S.C. §151 *et seq.*, 45 U.S.C. §152. If the procedures of RLA are to be replaced by courts and juries in emotional distress cases such as the cases at bar, it will have a major adverse impact on the effectiveness of RLA and increase the burden on an already overloaded federal court system.

For the foregoing reasons AAR respectfully submits that the attached *amicus curiae* brief will not only aid this Court in the resolution of the questions raised by the opinions below, but may also help to bring this Court's attention to the importance and effect its decision will have on the entire railroad industry in the United States.

AAR therefore moves this Court for leave to file the attached brief.

Respectfully submitted,



CHARLES F. CLARKE
Counsel of Record
BRADLEY J. BICKETT
BRENDA M. JOHNSON
SQUIRE, SANDERS & DEMPSEY
4900 Society Center
127 Public Square
Cleveland, Ohio 44114-1304
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Attorneys for Amicus Curiae Association of American Railroads

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ROBERT W. BLANCHETTE
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BRIEF OF *AMICUS CURIAE* ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF PETITIONER

QUESTION PRESENTED

Does FELA provide a statutory cause of action for the negligent infliction of emotional distress in the absence of physical impact?

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45 U.S.C. §152. 5

45 U.S.C. §153. 5

Other Authorities

American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1980) 14

Association of American Railroads:

1979 Claims and Litigation Report (1980) 1

1992 Claims and Litigation Report (1993) 1

Bureau of Labor Statistics, *Occupational Injuries and Illnesses in the United States* (1991) 1

Petition for Writ of Certiorari of Burlington Northern Railroad Co., *Burlington Northern R.R. Co. v. Ford*, 819 P.2d 169 (Mont. 1991), *cert. granted*, 112 S.Ct. 964 (1992) (No. 91-779) 4

Everstine, Diane Sullivan & Everstine, Louis, *The Trauma of Response: Treatment of Emotional Injury*, 176-77 (1993). 15,16

Figley, Charles R., Scrignar, C.B. & Smith, William H., *The Aftershocks of Trauma*, 26 Patient Care 121 (March 30, 1992). 15

Keeton, W., Page, *et al.*, *Prosser & Keeton on Torts* §54 (5th ed. 1984). 8,11

Marlowe, Douglas Bryan, Comment, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781 (1988). 14

Mathis, James L., *Psychiatric Diagnoses: A Continuing Controversy*, 17 Jour. of Med. & Phil. 253 (1992). 13,16

Monroe, Scott M. & Johnson, Sheri L., *The Dimensions of Life Stress and the Specificity of Disorder*, 20 J. of App. Soc. Psych. 1678 (1990)... 15

Popper, Karl, *Conjectures and Refutations: The Growth of Scientific Knowledge* (5th ed. 1989) ... 15

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Scheff, Thomas J., *Accountability in Psychiatric Diagnosis: A Proposal in Contemporary Directions in Psychopathology: Toward the DSM-IV* 265, 274 (Theodor Millon & Gerald L. Klerman, eds. 1986)..... 13,14

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Travelers Insurance Company, GI-55826, *The Health and Welfare Plan of the Nation's Railroads and the Railway Labor Organizations* (1984) 18

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INTEREST OF *AMICUS CURIAE*

The Association of American Railroads (AAR) is a voluntary, nonprofit, incorporated trade association. Its members constitute the vast majority of the nation's railroads, operating approximately 76 per cent of the total line-haul mileage, producing approximately 91 per cent of the freight revenues, and employing approximately 90 per cent of the railway work force in the United States, which numbers in total about 260,000 employees. AAR represents its members before courts, agencies and the Congress on matters of general concern to the railroad industry.

Working conditions for railroad employees today are safer than they have ever been before.[1] However, AAR members spend almost one billion dollars annually under the Federal Employers' Liability Act (FELA) to compensate employees who are hurt on the job. This amount has been increasing steadily in recent years despite a continued decline in injuries.[2] Thus, any

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judicial decisions which expand the scope of compensable injury under FELA to include work-related emotional stress is of material interest and concern to AAR.

The two decisions of the Third Circuit now before this Court, if allowed to stand, would even further increase the cost of FELA to the nation's railroads, because they permit recovery under FELA for purely emotional injury without any contemporaneous physical injury to the employee which precipitates the emotional stress.

This Court has never permitted recovery for pure emotional distress under FELA without contemporaneous physical impact. However, in 1987, in *Atchison T. & S. F. R. Co. v. Buell*, 480 U.S. 557 (1987), this Court held that the Railway Labor Act (RLA), 45 U.S.C.S. §§151-168 (1992) is not a railroad employee's exclusive remedy for claims of intentional harassment, threats or intimidation inflicted by supervisors or fellow employees, suggesting that, in a proper case, an employee could make his or her claim under FELA. However, this Court specifically declined to decide in *Buell* "whether purely emotional injuries are cognizable under FELA." *Id.* at 567. Rather, it stated that the question of whether one can recover for emotional injury under FELA may not be susceptible to an all-inclusive "yes" or "no" answer but that "as in other areas of law . . . broad pronouncements may have to bow to the precise application of developing legal principles to the particular facts at hand." *Id.* at 570.

As *amicus* in *Buell*, AAR expressed concern that if FELA was to become an alternative for employees with grievances arising out of working conditions, many of these claims would crowd the dockets of the federal courts. This Court discounted this concern, stating that

it was based on the misguided belief that all sorts of minor grievances would become FELA cases. *Id.* at 566-567 n.13. The Court disagreed that a significant percentage of employees bringing grievances under RLA suffer the type of "severe emotional injury that has generally been required to establish liability for purely emotional injury . . . and that a significant percentage of employees are subject to the type of unconscionable abuse which is a prerequisite to recovery." *Id.*

AAR's concern was based on the apprehension that an adverse decision in *Buell* would lead to lower court decisions like *Gottshall* and *Carlisle*. With employees now having the option of bypassing RLA, railroads are now confronted with FELA litigation where all that is required to state a claim is an employee with an allegedly work-induced anxiety, who does not like his boss or has some other complaint about conditions in the workplace, and a psychiatrist willing to testify that plaintiff was severely mentally distressed thereby.[3] Hence, the

[3] Unlike the Title VII legislation recently construed by this Court in *Harris v. Fork Lift Systems, Inc.*, 62 U.S.L.W. 4004 (U.S. Nov. 9, 1993), FELA was not intended to afford workers protection from workplace harassment or abuse. Instead, FELA was intended to provide railroad workers with a remedy for physical injuries resulting from employer negligence. Drawing a distinction between Title VII claimants and parties making tort claims, Mr. Justice Scalia noted in his concurrence in *Harris* that "[T]he class of plaintiffs seeking to recover for *negligence* is limited to those who have suffered harm." *Harris* at *5 (emphasis added). Under FELA, although a liberal definition of "negligence" is warranted through judicial interpretation of the statute, "harm" historically has been limited to the sorts of physical injuries that were relatively common in the railway industry. *See, e.g., Lancaster v. Norfolk & Western Ry. Co.*, 773 F.2d 807, 813 (7th Cir. 1985) (Posner, J) *cert. denied*, 480 U.S. 945 (1987) ("[T]he FELA does not create a cause of action for tortious harms brought about by acts that lack any physical contact or threat of physical contact." *Id.*)

disposition of *Gottshall* and *Carlisle* by this Court is of continuing and growing interest to the railroads of the United States.

AAR has another strong interest in this case as a result of the fact that railroads, because of their widespread operations, are subject to suit in a number of different venues, often in places that have little connection to the accident that gives rise to the suit.[4] The liberal venue provisions of FELA have made forum shopping commonplace.[5] Since *Buell* there have been a large number of decisions by lower federal courts on the issue of whether and under what circumstances emotional injuries are cognizable under FELA. The courts have reached widely varying results, from requiring that there be a physical impact as a condition for recovery, *see, e.g., Gaston v. Flowers Trans.*, 866 F.2d 816 (5th Cir. 1989), to, as the cases at bar held, permitting recovery for any injury that is foreseeable. When such a serious conflict exists among the circuits, railroads are particularly vulnerable as FELA plaintiffs have a greater ability to select favorable jurisdictions than do plaintiffs in other types of actions. Therefore, AAR has a strong interest that there not be a migration of marginal cases to the Third Circuit.

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[4] Railroads can be sued under FELA in state or federal court wherever the railroad is doing business. 45 U.S.C. §56.

[5] For instance, in its Petition for Writ of Certiorari filed with respect to *Burlington Northern R.R. Co. v. Ford*, 819 P.2d 169 (Montana 1991), *cert. granted*, 112 S.Ct. 964 (1992) (No. 91-779) (challenging Montana's liberal venue provisions), Burlington Northern Railroad Company documented that two counties in Montana with pro-plaintiff reputations had become magnets for FELA filings. During a six year period, over 85 percent of Montana FELA claims were filed in those two counties, even though none of those claims alleged an injury had occurred in the county of venue, and only 10 (out of 122) were brought by a resident of the county of venue. Burlington Petition at 16.

A further interest of AAR in this case is the effect it will have on the heretofore well-established employer-employee administration of RLA. Under that act, work-related grievances, whether or not related to the interpretation or application of a collective bargaining agreement, are subject to mandatory mediation under the procedures therein set forth. 45 U.S.C. §151 *et seq.*; 45 U.S.C. §152. Those proceedings mandate that the parties first seek resolution on the railroad's own property up to the Chief Operating Officer, then, if unresolved, to the National Railroad Adjustment Board, which is composed equally of representatives of both management and labor. 45 U.S.C. §153. Where the employee's physical ability to perform his work is at issue, the question is referred to a three doctor panel, one doctor selected by each party and the third selected by the first two. *Gunther v. San Diego & A.E.R. Co.*, 382 U.S. 257, 261-62 (1965).

If the procedures of RLA are to be replaced by courts and juries in emotional distress cases such as the cases at bar, it will have an adverse impact on the effectiveness of RLA and increase the burden on an already overloaded federal court system.

SUMMARY OF ARGUMENT

The negligent infliction of emotional distress is not the type of physical "injury" for which the FELA was designed by Congress as a remedy. That statute, as this Court has many times held, was enacted by Congress to compensate physically injured railroad workers for railroad negligence causing their injury. It should not have engrafted upon it claims of psychological injury alone because Congress did not and has not so provided and neither science nor the ordinary layman are capable of providing Congress, courts and juries with objective facts with which to determine if purely psychological injuries have occurred. The interests of justice suggest a test which requires actual measurable physical impact as a basis for recovery of damages for emotional stress.

ARGUMENT

I. The Opinions Below Expand FELA Coverage From Its Historic Congressional Purpose Of Protecting Physically Injured Railroad Workers To A Type of Claim That Congress Never Intended And This Court Has Never Heretofore Permitted.

The two opinions of the Third Circuit Court of Appeals before the Court, *Gottshall v. Consolidated R. Corp.*, 988 F.2d 355 (3d Cir. 1992) and *Carlisle v. Consolidated R. Corp.*, 990 F.2d 90 (3d Cir. 1993), involve a single issue. That issue is whether a railroad employee has a cause of action under FELA, in the absence of physical impact, to recover damages when the only alleged statutory "injury" is the result of the negligent infliction of emotional distress.

In *Gottshall*, the plaintiff witnessed a fellow employee, who was his friend, suffer a fatal heart attack while working on a very hot day. Plaintiff had to stay at the workplace while his friend's body lay nearby awaiting the coroner, and plaintiff began to fear that he too might have a coronary. Subsequently he became depressed and sought psychiatric care.

In *Carlisle*, the plaintiff was required to work as a dispatcher for long hours under allegedly stressful conditions. He too became depressed and sought psychiatric care. Carlisle recovered an FELA judgment of $386,500. In contrast, four of his fellow workers, exposed to the same workplace stresses, had their claims dismissed by another district court in the Third Circuit on the ground that "the type of conduct that has led to the evolution of the negligent infliction tort is simply not the type of conduct alleged in the case at bar." *Kraus v.*

Consolidated Rail Corp., 723 F. Supp. 1073 (E.D. Pa. 1989), *appeal dismissed on procedural grounds*, 899 F.2d 1360 (3d Cir. 1990).

In neither case did plaintiff suffer direct physical impact, nor was either exposed to any stress of present physical impact. In both cases plaintiffs, had they chosen, could have sought relief under RLA. However, the Third Circuit, admitting that it was breaking new ground, held that both plaintiffs were entitled to recover under FELA.

While *Buell* expressly declined to decide under what circumstances a purely emotional distress case could be made, *Buell* acknowledged that the Restatement of Torts, Second, recognizes the tort of intentional infliction of emotional distress, §46, but that the Restatement denies it for the negligent infliction thereof, §436A. This is also the view of W. Page Keeton, *et al., Prosser and Keeton on Torts* §54 (5th ed. 1984).

In *Carlisle*, the Third Circuit quotes the frustrated author of a 1959 ALR annotation in these words:

> The case law in the field here treated is in an almost unparalleled state of confusion and any attempt at a consistent exegesis of the authorities is likely to break down in embarassed perplexity. Early attempts by the courts to deal with the questions were complicated by the lack of any adequate body of legal authorities as well as by the inadequacy of the factual or scientific information available.

W. E. Shipley, Annotation, *Right to Recover for Emotional Disturbance or its Physical Consequences in the Absence of Impact or Other Actionable Wrong*. 64 A.L.R. 2d 100, 103 (1959).

That confusion has continued.

Since *Buell*, district and circuit courts have reached such varying results in more than 80 published opinions, leaving both panels below to conclude that, "in the wake of *Buell* . . . there is no common discernable principle, test, view or attitude." *Gottshall* at 365; *see also Carlisle* at 95 (quoting *Gottshall*).

Some of the difficulty in establishing a consistent standard comes from the nature of FELA itself. This Court stated in *Urie v. Thompson*, 337 U.S. 163 (1949), and reiterated in *Buell*, that FELA jurisprudence "gleans guidance" from common law developments. *Buell* at 568. The legislative history of FELA makes clear that it was enacted and amended because of the dangerous physical hazards associated with working on the railroad. *See* Petitioner's Brief Section I (A)(2). There is no evidence in that history that Congress intended to do more than provide recovery for physical injuries. There is simply no Congressional intention shown to protect employees from emotional distress unaccompanied by physical impact.

The history of FELA shows that Congress, when it has found the need, has been clear in indicating its intended scope and substance. As originally enacted, FELA replaced the doctrine of contributory negligence with comparative negligence and also abolished the common law fellow servant rule. Act of March 22, 1908, Pub. L. No. 60-100, 35 Stat. 65. Two years later, Congress amended FELA to permit suits to be filed in either state or federal court wherever the railroad does business. Act of April 5, 1910, Pub. L. No. 61-117, §§1, 6, 36 Stat. 291. In 1939, the statute was amended to abolish the common law doctrine of assumption of risk. Act of August 11, 1939, Pub. L. No. 76-382, §2, 53 Stat. 1404.

At the same time, in its interpretation of FELA, this Court historically has striven to remain true to the intent indicated, declining to permit recovery under FELA when there was no evidence that Congress intended such a recovery to be available. Thus, in *Monessen Southwestern R. Co. v. Morgan*, 486 U.S. 330 (1988), this Court refused to permit the recovery of prejudgment interest in FELA cases. In that case, this Court searched for Congressional intent on the question of whether prejudgment interest was available. In finding that prejudgment interest was generally unavailable when FELA was enacted and construing congressional silence "in the appropriate historical context" as an intention not to alter the *status quo*, this Court said:

> We are unwilling in the face of such congressional inaction to alter the longstanding apportionment between carrier and worker of the costs of railroading injuries. If prejudgment interest is to be available under the FELA, then Congress must expressly so provide.

Id. at 339.

Monessen was not the first case in which this Court ruled that expanding the scope of FELA was a task for Congress, and not the judiciary. In *Crane v. Cedar Rapids & Iowa City Ry. Co.*, 395 U.S. 164 (1969), the Court declined on exactly those grounds to extend FELA remedies to a non-employee, even though the non-employee had been working with railroad equipment and the injury had been a result of a violation of federal safety laws.

In general, when construing federal statutes intended to grant particular classes of employees remedies for workplace injury, this Court has deferred to Congress when asked to expand the scope either of the protected class or the remedies available. *See, e.g., Miles v. Apex Marine Corp.*, 111 S.Ct. 317 (1990) (relying on

congressional intent analysis to limit damages in wrongful death action under Jones Act); *Pennsylvania R.R. Co. v. O'Rourke*, 344 U.S. 334 (1953) (relying on congressional intent analysis to determine scope of Longshoremen's and Harbor Workers' Compensation Act).

The analysis applied in *Monessen* is appropriate in the present case. At the time FELA was enacted, claims for emotional injury in the absence of physical impact were not unknown at the common law.[8] However, as with prejudgment interest in personal injury cases, most states rejected these claims. *See generally* Keeton, §54. Although Congress specifically drafted FELA to liberalize other aspects of the common law, FELA is silent regarding emotional injuries. Further, while courts have held that there can be no recovery for emotional injury absent concurrent physical impact, Congress has remained silent on the issue, just as it had regarding availability of prejudgment interest.

This parallel analysis leads to a parallel conclusion: Engrafting a cause of action for emotional injury in the absence of physical impact upon FELA, which is a statute intended to protect railroad workers from injuries caused by physical impact, is a task that should be left to Congress.

Buell was decided in 1987. Two years later, in *Gaston v. Flowers Transportation*, 866 F.2d 816 (5th Cir. 1989), a Jones Act case applying FELA, the Fifth Circuit could say that an FELA case involving injury unaccompanied by impact was a case of first impression before it. Today, however, six years after *Buell*, almost every Circuit has considered the issue with varying results. There are now more than eighty written opinions by Federal Courts on this precise subject, including over

[8] *See, e.g., Purcell v. St. Paul City Ry.*, 50 N.W. 1034 (Minn. 1892).

twenty by the Court of Appeals. An uncounted number of claims have been settled, as the majority of FELA claims are settled, without trial.[7]

Clear judicial reasons for rejecting recovery under FELA for emotional distress unaccompanied by physical impact were given in *Gaston:*

> For the consequences of creating a compensable bystander's cause of action under these federal worker's compensation acts for seamen and railroaders would be random and wayward ones, multiplying damages incalculably on the basis of factors which are entirely incidental to the operation of the train or vessel and which bear little or no relationship to the safety of that venture—factors such as how many crew members happen to be standing around to observe an incident, whether their vision is obscured by darkness or weather, how close they are to the occurrence, and the like. Because they are irrelevant to that operation, visiting exponential damages on an employer on a basis of such factors is not only random and wayward, but serves in no way to advance the major subsidiary purposes of affording such remedies as those of the FELA/Jones Act to trainmen and seamen: to hold out incentives to their employers to reduce dangers and to operate safely. More, extending such potentially ruinous liability to employers involves evaluating economic tradeoffs which we (or any other court) are poorly equipped even to envision, let alone to weigh against each other.

Id. at 820.

[7] *See, e.g., Visconti v. Consolidated Rail Corp.*, 801 F. Supp. 1200 (S.D. N.Y. 1990), in which plaintiff alleged 34 "incidents of harassment" as grounds for her FELA claims. The court rejected plaintiff's claims, stating: "Workplace disputes over hours, shifts and wages properly are resolved through the grievance procedures set forth in collective bargaining agreements and the mandatory statutory mechanisms. Disgruntled employees cannot transform such disputes into tort actions simply because they are dissatisfied with the results of the appropriate procedures." *Id.* at 1211.

II. The Present Uncertainty And Unreliability Of Psychiatric Testimony Regarding Emotional Trauma Supports Adoption Of A Bright Line Rule Requiring Physical Impact As A Prerequisite For A FELA Cause Of Action.

A claim of purely emotional injury is inherently difficult to disprove in a court of law. No objective evidence can be presented as indicia of psychic pain; therefore, proof of emotional injury must usually be offered through the medium of experts trained to discern its existence.

Practitioners in the field, as well as other learned professionals, acknowledge that psychiatric diagnoses lack the precision and objectivity of other scientific fields. As one scholar put it,

> We like to see ourselves as scientists, but our literature, until recent years, has been largely speculative and philosophical. Primarily we are doctors of medicine, but more often than our colleagues in other fields of medicine, we deal with the subjective reports of our patients and with their behaviorial manifestations which often are complicated by issues of morality and legality.

James L. Mathis, *Psychiatric Diagnoses: A Continuing Controversy*, 17 Jour. of Med. & Phil. 253, 259 (1992). Another was more succinct: "Stated bluntly, in terms of requirements of the natural science model, psychiatric diagnosis is usually quite unreliable." Thomas J. Scheff, *Accountability in Psychiatric Diagnosis: A Proposal*, in *Contemporary Directions in Psychopathology: Toward the DSM-IV* 265, 274 (Theodor Millon & Gerald L.

Klerman, eds. 1986) (noting statistical studies indicating level of disagreement in diagnoses).[8]

Nowhere is this unreliability potentially more endemic than in the field of psychic trauma diagnosis and treatment. Mental health care professionals are still in the process of defining the forms that such trauma may take, and the stimuli from which it may arise.[9] In its present state, "[r]esearch on common stressful life events has been criticized as tautological: Stressors are events which produce a stress response; stressors are negative because they are associated with unwanted consequences. Traumatic stress research, as a study of extreme stress, is subject to the same criticism: An event is a trauma because its consequences are traumatic." Solomon & Maser at 1625 (citations omitted).

Issues of causation in psychic trauma research are equally unsettled; researchers still remain unable to predict with any specificity what sorts of events are liable to induce trauma, or the sorts of disorders that are

[8] This self-assessment by members of the profession and other scholars is inconsistent with the credulity some legal scholars and state courts have shown regarding psychiatric testimony; *see, e.g.*, Douglas Bryan Marlowe, Comment, *Negligent Infliction of Emotional Distress: A Jurisdictional Survey of Existing Limitation Devices and Proposal Based on an Analysis of Objective Versus Subjective Indices of Distress*, 33 Vill. L. Rev. 781 (1988) (citing *Rodrigues v. State*, 472 P.2d 509 (Haw. 1970); *Molien v. Kaiser Found. Hosps.*, 616 P.2d 813 (Cal. 1980)).

[9] Although recognized in the form of "shell-shock" since around World War I, truly systematic study of traumatic stress did not begin until 1980, when "posttraumatic stress disorder" was first recognized as a diagnostic category by the American Psychiatric Association. Susan M. Solomon & Jack D. Maser, *Defining Terms and Instruments for Assessing Traumatic Stress*, 20 J. of Applied Soc. Psych. 1623, 1624 (1990) (citing American Psychiatric Association, *Diagnostic and Statistical Manual of Mental Disorders* (3d ed. 1980)).

likely to ensue. *See, e.g.*, Scott M. Monroe & Sheri L. Johnson, *The Dimensions of Life Stress and the Specificity of Disorder*, 20 J. of Applied Soc. Psych. 1678 (1990) ("One major challenge to a full understanding of stress-disorder relationships pertains to the lack of knowledge surrounding the choice of disease: What determines the type of the disorder that ensues after stress?" *Id.*)

While the psychiatric profession may be able to afford the luxury of such imprecision, the legal profession cannot. In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 113 S.Ct. 2786 (1993), this Court acknowledged and approved the premise that, in order to warrant the label, purportedly scientific techniques must meet certain standards of testability and falsifiability. *Id.* at 2796-97 (citing Karl Popper, *Conjectures and Refutations: The Growth of Scientific Knowledge* 37 (5th ed. 1989)).

In this climate, a claim of purely psychological injury threatens to impose virtually strict liability upon anyone upon whom it is made. Practitioners who testify in court are urged to seek a potentially traumatic event in a patient's past when faced with symptoms as amorphous as apathy, weight loss, depression, substance abuse, impulsive behavior, headaches or deterioration in work performance. *See* Charles R. Figley, C.B. Scrignar & William H. Smith, *The Aftershocks of Trauma*, 26 Patient Care 121 (March 30, 1992). Events such as routine disciplinary actions are styled "traumatic" by diagnosticians. *See* Diane Sullivan Everstine & Louis Everstine, *The Trauma of Response: Treatment of Emotional Injury* 176-77 (1993) (text even includes a

chapter on litigation preparation).[10] At the very least, such vagueness is guaranteed to spawn an utterly nonsensical jurisprudence of liability.

FELA should not become a ground upon which litigants attempt to prove injuries that science cannot define.

Would it not be better for the impartial and evenhanded administration of justice that a bright line rule be established which denies recovery under FELA for alleged injuries caused by emotional distress unless there has been concomitant physical injury? A respectable number of courts below are continuing to so hold. *See* Petitioner's Brief, Section II (B).

In a very recent case the Fifth Circuit has recognized the necessity for such an objective rule requiring physical impact or injury in order to recover for emotional trauma. In *Gough v. Natural Gas Pipeline Co. of America*, 996 F.2d 763, 765 (5th Cir. 1993), the court stated that an important purpose of the physical impact rule is "to provide courts with an objective means of ensuring that the alleged mental injury is not feigned." *Id.*, citing *Hagerty v. L. & L. Marine Services, Inc.*, 788

[10] Definitions of trauma and other psychological maladies are also politically malleable. *See, e.g.*, Nada L. Stoland, *The Myth of the Abortion Trauma Syndrome*, 268 JAMA 2078, 2079 (Oct. 21, 1992), in which the author notes that the only scholarship supporting the existence of such a syndrome has been based on anecdotal evidence, and has appeared in religious and "nonspecialty" literature, and yet the term has taken its place in popular discourse. Another observer has noted that "third party intervention," in the form of government and private entities, such as insurers, has a significant impact on diagnostic categories and forms of recommended treatment. Mathis at 258-59.

F.2d 315, 318 (5th Cir. 1986).[11] Since the psychiatric community appears incapable of providing courts with anything even approaching objective criteria, such a bright-line rule is necessary.

In its earlier first decision adopting this rule (in which the court rejected a claim which factually was very similar to that of *Gottshall*), the court of appeals in *Gaston* reflected:

> Given the present state of psychiatric knowledge, how common is the incidence of actual, emotional injury derived from witnessing a single occasion on which another is killed or injured? Who, if anyone, knows?

Gaston at 820 n.3,[12]

Since neither science nor the experiences of the ordinary lay person are capable of providing courts with objective facts from which to determine the existence of purely psychological injuries, the interests of justice require adoption of a bright line test. The test most consistent with the language and purpose of FELA, which was intended to compensate railway workers for physical injuries, is the physical impact test. This is especially the case where, as here, plaintiffs suffering emotional distress at the workplace are not without other remedies.

[11] *Gough*, a case involving maritime injury, cites in support of its propositions more than one Jones Act case in which a physical impact standard was adopted. *See, e.g., Hagerty; Gaston v. Flowers Transp.*, 866 F.2d 816 (5th Cir. 1989). Since the Jones Act incorporates FELA, Jones Act cases and their progeny are highly relevant to the issue at hand.

[12] In *Gaston*, a case arising under the Jones Act, the plaintiff saw his half-brother crushed between a barge and the tug pushing it, but suffered no injury himself (other than a bruised elbow). Plaintiff claimed that he suffered from post-traumatic stress disorder, and sought damages under a bystander theory of liability.

III. The Railway Labor Act And Other Labor Statutes And Labor Agreements Provide An Adequate And Well-Established Remedy For Employee Workplace Grievances In Cases Which FELA Does Not Reach.

Adopting a physical impact test will not leave railroad workers who suffer from job-related stress without recourse or remedies for their situation.

For over a century, railroad workers have been well-organized to protect their rights. Work rules governing the conditions of the workplace and the nature of the work each employee is required to perform are pervasive in the industry. Carefully crafted labor agreements set up elaborate procedures for the processing and remedying of workplace grievances. Also, under these agreements, railway workers are entitled to health care and disability benefits that provide for the treatment not only of physical ailments, but also alcohol and chemical dependency as well as psychological and nervous disorders. *See, e.g.*, Travelers Insurance Company, GI-55826, *The Health and Welfare Plan of the Nation's Railroads and the Railway Labor Organizations* 10-14 (1984) (summarizing employee health benefits); *id.* at 60-61 (discussing terms specific to psychological disorders and $2,000 cap on yearly out-of-pocket expenses); U.S. Railroad Retirement Board, UB-5, *Unemployment and Sickness Benefits for Railroad Workers* 4-11 (1978) (summarizing sickness benefits).

RLA is specifically designed to enforce these agreements in favor of a railroad worker who has a grievance of any kind against his employer. RLA embraces:

> all disputes growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working condition. . . .

45 U.S.C. §151(a)(5).

Thus grievances subject to RLA resolution involve not only the interpretation of labor agreements affecting more than one employee but interpretation, for individual employees, of operating rules, hours of service, time off and redress for the very working conditions for which plaintiffs Gottshall and Carlisle sought relief under the FELA. If the grievance cannot be settled on the railroad property, it is sent to the National Railroad Adjustment Board (Adjustment Board), composed equally of representatives of management and labor.

As this court has said, the Adjustment Board:

> is peculiarly familiar with the thorny problems and the whole range of grievances, that constantly exist in the railroad world. Its membership is in daily contact with workers and employees, and knows the industry's language, customs and practice.

Gunther at 261.

Thus, the adoption of the physical impact test urged here will not leave workers without remedy. Emotional stress cases may not withstand the rigors of the court system. However, the Adjustment Board consists of labor and management representatives who are familiar with not only the rights of employees under their labor contracts but also the established history, customs and practices of the industry, the "common law of the shop." In fact, RLA may provide a more meaningful remedy for redressing stressful working conditions. Whereas FELA simply awards monetary damages to an individual employee, which may or may not have an impact on the workplace, RLA is designed to address directly the working environment.

CONCLUSION

Nothing in the Congressional history of FELA warrants engrafting upon the cause of action therein created a cause of action for injuries resulting from psychological trauma unaccompanied by physical impact. FELA was enacted by Congress and has been enforced to compensate workers for workplace physical injuries. A bright line test requiring actual physical impact before there can be recovery of damages under FELA for psychological injury accords both with the general interests of justice and the specific purpose of FELA.

Accordingly, *amicus curiae,* Association of American Railroads, respectfully submit that the cases before it on this petition should be reversed and final judgment entered for petitioner Consolidated Rail Corporation.

Respectfully submitted,

CHARLES F. CLARKE
Counsel of Record
BRADLEY J. BICKETT
BRENDA M. JOHNSON
SQUIRE, SANDERS & DEMPSEY
4900 Society Center
127 Public Square
Cleveland, Ohio 44114-1304
(216) 479-8500
Attorneys for Amicus Curiae Association of American Railroads

Of Counsel:
ROBERT W. BLANCHETTE
Vice President-Law and General Counsel
DANIEL SAPHIRE
General Attorney
ASSOCIATION OF AMERICAN RAILROADS
50 F Street, N.W.
Washington, D.C. 20001
(202) 639-2505